

**EXAMINING THE FILIBUSTER: LEGISLATIVE PROPOSALS
TO CHANGE SENATE PROCEDURES**

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WEDNESDAY, JULY 28, 2010

United States Senate,
Committee on Rules and Administration,
Washington, D.C.

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The Committee met, pursuant to notice, at 10:40 a.m., in Room SR-301, Russell

Senate Office Building, Hon. Charles E. Schumer, Chairman of the Committee, presiding.

Present: Senators Schumer, Durbin, Nelson, Udall, Goodwin, Bennett,
Alexander, and Roberts.

Staff Present: Jean Bordewich, Staff Director; Veronica Gillespie, Elections
Counsel; Adam Ambrogi, Counsel; Sonia Gill, Counsel; Julia Richardson, Counsel; Lauryn
Bruck, Professional Staff; Lynden Armstrong, Chief Clerk; Matthew McGowan,
Professional Staff; Mary Jones, Republican Staff Director; Paul Vinovich, Republican
Chief Counsel; Michael Merrell, Republican Counsel; and Rachel Creviston, Republican
Professional Staff.

OPENING STATEMENT OF CHAIRMAN SCHUMER

Chairman Schumer. The Rules Committee will come to order. I apologize to
my colleagues for being late.

I want to first thank my friend, Ranking Member Bob Bennett, and my other
colleagues present for participating in this hearing. Bob, I apologize. We were at the

27 Archives dedicating the Roosevelt papers, which have finally been brought back to Hyde
28 Park. There was a grand ceremony with all the members of the Roosevelts family.

29 Senator Bennett. Having wrestled with Washington traffic, I understand your
30 excuse exactly.

31 Chairman Schumer. I apologize for that.

32 Senator Bennett. And I accept it.

33 Chairman Schumer. But I am sorry for my delay.

34 Before we begin, I do want to thank Bob and my other colleagues for
35 participating in this hearing. This is the fourth in our series of hearings to examine the
36 filibuster. There is one person whose contributions I think we would all like to
37 recognize, and that is our friend, Senator Robert Byrd. Senator Byrd served on the
38 Rules Committee longer than any Senator in history. He became a Committee member
39 on February 25, 1963. That was before Michael Bennet was born. Is that true?

40 Senator Bennet. That is true.

41 [Laughter.]

42 Chairman Schumer. That is true. How about before Frank Lautenberg was
43 born?

44 Senator Lautenberg. Mr. Chairman, please, order.

45 [Laughter.]

46 Chairman Schumer. Thank you. In any case, he gave service to his State and
47 country much longer than that, but today we honor his 47 years on this Committee.
48 Senator Byrd's knowledge of the Senate rules and procedures was unsurpassed. He
49 took a very active interest in this series of hearings on the filibuster. He made a
50 moving personal appearance at our hearing in May and submitted written statements
51 for our April and June hearings. No one who was here on May 19th, and I know a few
52 of you were--Senator Udall, Senator Bennett, and Senator Alexander, I think we were all
53 here--will ever forget Senator Byrd's words to us that day. He leaves to this Committee
54 a legacy that will long be remembered in the history of our Nation.

55 And now it is my pleasure to welcome to this Committee a new member taking
56 Senator Byrd's place, and that is Senator Carte P. Goodwin, Senator from West Virginia.
57 Carte was appointed to our Committee last week, and on behalf of my colleagues, I
58 would like to say we all look forward to working with Senator Goodwin for his tenure on
59 the Rules Committee. Thank you and welcome, Carte. We are glad you are here.

60 Senator Goodwin. Thank you.

61 Chairman Schumer. Over the course of these hearings, we have looked at the
62 development of the filibuster since the beginning of our country and the growing
63 challenges that it presents to the Senate. And today we are going to look at two of the
64 very interesting solutions to the problem created by abuse of the filibuster. The first
65 two proposals we are going to examine are Senate Resolution 465, introduced by
66 Senator Lautenberg, and Senate Resolution 440, introduced by Senator Michael Bennet.

67 I am very pleased to welcome both Senators to our panel.

68 I read Senator Lautenberg's resolution. It is ingenious, and many people say,
69 well, if you are going to filibuster, you ought to get up there and be required to talk
70 about it. And everyone says, well, there is no way that can happen. You will hear
71 about Senator Lautenberg's proposal from him as he speaks, and I think people will be
72 very interested. He addresses the problem of unnecessary delay by expediting a
73 cloture vote under certain circumstances and requiring those who are opposed to
74 cloture to take responsibility for continuing debate on the floor.

75 Senator Bennet's resolution is also extremely interesting, and he has worked
76 long and hard on this issue for much of the time since he has been here. It contains
77 half a dozen key provisions aimed at changing the way filibusters and cloture votes are
78 handled and also addresses secret holds, the topic of our last hearing.

79 Both proposals remind us the Senate is designed as a place for debate. We
80 want full, fair, and robust debate. We know that with actual debate minds are
81 changed, positions are moved, compromise is reached. However, often we see the
82 filibuster being used merely to delay or obstruct Senate action. Some delays are not
83 even intended to block the underlying bill, but to delay consideration of other
84 legislation. Senator Lautenberg's bill addresses this problem.

85 We also want Senators on both sides of the aisle to work together and for the
86 views of a minority to be heard. And when you sit through our hearings, each side has
87 expressed legitimate complaints. We say-- Democrats say, "It is delay, delay, delay,

88 even over trivial things." Republicans say, "We have no choice but to delay, unless we
89 are allowed the opportunity to offer amendments because, in general, the majority sets
90 the agenda, but then the minority can offer amendments. And, of course, though we
91 hope not, every one of us knows we might be sitting on both sides of the majority and
92 minority divide. So we are trying to be fair and down the middle of this issue.

93 Senator Bennet addresses the abuse of the filibuster when it is used as a tool for
94 pure partisanship, rather than a tool for discussion and thought.

95 Our second panel is going to include several experts in Senate procedures --
96 Professor Barbara Sinclair of UCLA and Professor Gregory Koger from the University of
97 Miami. They are going to share their thoughts about the context for these reform
98 proposals. We are also going to hear on the second panel from Elizabeth Rybicki, an
99 analyst on Congress and the legislative process at CRS. Although the Committee's
100 practice is not to have staff members from CRS testify at hearings, I have agreed to our
101 Republican colleagues' request to have her appear in this circumstance to provide
102 informational testimony related to these two proposals.

103 I believe the first three hearings that we have had have shown the filibuster has
104 been abused more and more in recent Congresses, and it is time for the Senate to
105 consider what to do about it. Our first hearing focused on the history of the filibuster.
106 The second looked at the impact of the filibuster on the Senate today and on the
107 functioning of our Government. Our third hearing examined the problem of secret
108 holds and delaying impact. A special note is given to a member of our Committee,

109 Senator Udall, who has been long pushing that we have these series of hearings and
110 explore these issues.

111 With the groundwork we have laid in past hearings, we are going to turn today
112 to consideration of specific proposals for reforms. I plan future hearings to consider
113 resolutions proposed by Senator Tom Harkin and Senator Udall, a member of this
114 Committee. I look forward to listening to my colleagues and experts who have come
115 to share their knowledge and experience with us.

116 I am now going to turn to Ranking Member Bennett for his opening statement.
117 Then we will go to our two witnesses. After Senator Lautenberg and Senator Bennet
118 have testified, we will have other members make opening statements. I know both
119 Senators have busy schedules after they testify.

120 Senator Bennett.

121 **OPENING STATEMENT OF SENATOR BENNETT**

122 Senator Bennett. Thank you very much, Mr. Chairman. I do not have an
123 extended opening statement. I welcome our two colleagues both for their willingness
124 to testify and for their thought they put into their proposals.

125 The whole question of minority rights in the Senate is one of the most significant
126 ones we can deal with, and the filibuster has changed over the years. I have
127 discovered, as I have said in these hearings before, that the Senate has rules and the
128 Senate has precedent, and basically the precedent trumps the rules. That is, the way
129 we do things seems to be more important than, well, the rule says you can. And I have

130 witnessed a sea change in precedent with respect to the filibuster in the relatively brief
131 time I have been in the Senate. Comparing me to Robert C. Byrd, it is a brief time
132 indeed. And we have seen the filibuster go from, when I first came, a tool that was
133 used relatively rarely and on only the most significant issues to a standard
134 understanding between both Leaders that anything significant requires 60 votes. And I
135 have heard my colleagues lament this change and will not take the time of the
136 Committee to go back in my view of history and where it came from and from whom it
137 came. But it has been an interesting thing for me to see the precedent shift quite
138 dramatically in the period of time that I have been here.

139 So we are faced now with the reality that it takes 60 votes to get anything
140 through the Senate. Is that a good thing or a bad thing? And do we want to move in
141 a direction that leaves the minority more in the position of the minority in the House of
142 Representatives? And I remember a Speaker once asked--I cannot remember which
143 speaker it was--"What are the rights of the minority?" And he said, "The minority have
144 the right to draw their paychecks and to make a quorum." And, fortunately, in the
145 Senate that has not been the case. The minority has had the right to be heard. The
146 minority has had the right to have an influence and an impact. And as we go forward
147 in this effort, we need to be very careful, I believe, not to create a circumstance where
148 the minority in the Senate is reduced to the status of the minority in the House.

149 So I am looking forward to the specifics of the proposals made by our two
150 colleagues and to the commentary of the other witnesses on those specifics and how

151 these proposals would really work in practice.

152 So I thank you for calling the hearing and look forward to what it is we have to
153 learn.

154 Chairman Schumer. Thank you, Senator Bennett.

155 Now we will proceed to Senator Lautenberg. Your entire statement will be read
156 in the record, and you may proceed.

157

158 **STATEMENT OF THE HONORABLE FRANK LAUTENBERG, A UNITED**
159 **STATES SENATOR FROM THE STATE OF NEW JERSEY**

160 Senator Lautenberg. Thank you, Mr. Chairman and Ranking Member Senator
161 Bennett. Senator Bennett, you, I know, are kind of in the twilight of your service in the
162 Senate, but you were always someone who I saw got down to business and did not use
163 a lot of time casually. And I have always respected that and your thoughtfulness as
164 well. So your presence certainly will be missed.

165 This is not a picture of me in a younger day, but it is Jimmy Stewart, and his
166 performance here was really iconic.

167 We have got to improve the pace with which the Senate moves its legislative
168 agenda. There is no doubt about that. We have managed to alienate the public for
169 all kinds of things, and one of the things they say frequently is, "Nothing happens there."
170 And I guess that is from watching a TV screen and a digital clock ticking away.

171 To maintain his filibuster, Mr. Smith stood on his feet on the Senate floor and
172 spoke continuously for 23 hours, and we know that there were actually Senate
173 filibusters here that took longer than that, one Bob Byrd, another one Senator Strom
174 Thurmond. But eventually Mr. Smith's passion, fortitude, and arguments won the day.
175 The movie's portrayal of a filibuster has seeped into Americans' consciousness, but few
176 realize that the movie version of the filibuster bears little resemblance to what is going
177 on in the Senate today.

178 The filibuster was intended to extend debate, but today the filibuster is not
179 about debate at all. The filibuster, which used to be an extraordinary event, has
180 become nothing more than routine dilatory tactic, and it is now a silent filibuster. You
181 can expend next to no effort to slow down and stop the Senate from considering
182 legislation. These days you do not even have to come to the floor or even be in
183 Washington to launch a filibuster. And a silent filibuster is not just being used to
184 thwart contentious bills. Legislation is often stalled, and non-controversial nominees
185 are often blocked for no other reason than to delay the Senate calendar.

186 And, by the way, I have served in the majority and the minority and know that
187 what goes around comes around, and the fact that any rules we make now with the
188 majority as it is structured could shift. We are hopeful that it does not, obviously, but
189 the fact is that that is real life.

190 Now, here is the effect of the silent filibuster. We are not getting the people's
191 business done, and ordinary Americans are losing faith in our Federal Government and

192 the legislative process. The Framers of the Constitution intended the Senate to be a
193 deliberative body, not a chamber of silence.

194 The filibuster itself was meant to keep the flow of the debate going, not to stop
195 the Senate dead in its tracks. And my bill--common sense, I believe--the Mr. Smith Act,
196 is a modest measure that will bring Mr. Smith back to Washington by bringing the
197 Senate back to its roots. My bill preserves the rights of the minority and maintains a
198 60-vote threshold to end debate. It simply requires Senators who want to filibuster to
199 actually filibuster.

200 Once cloture is filed on a motion, nomination, or legislation, Senators who wish
201 to keep the debate going are going to have to come to the floor and voice their position
202 to their colleagues and to the country at large. And if at any point these Senators give
203 up the floor, we can move to an immediate cloture vote.

204 The Mr. Smith Act will bring deliberation and seriousness back to the world's
205 greatest deliberative body, and it will end the practice of delay solely for delay's sake
206 and to try to restore America's confidence in the legislative process.

207 Mr. Chairman, there are few people that I have met in my lifetime that I have
208 had more respect for than Senator Robert C. Byrd of recent memory. And as we all
209 know, his knowledge of Senate rules and procedure were unmatched. While Senator
210 Byrd never stated a position on my bill specifically, he was a fierce defender of the
211 Framers' intention that the Senate be a model for debate, discussion, and deliberation.

212 This past April, in a statement submitted to this very Committee, Mr. Chairman,

213 he said Senators should--and I quote him here--"be obliged to actually filibuster, that is,
214 to go to the floor and talk instead of finding less strenuous ways to accomplish the same
215 end.

216 And I believe the minority rights are a hallmark of the Senate, but I do not
217 believe that we are doing the right thing for this body or for our country by allowing
218 legislative tools to be misused. We must put the public good ahead of partisan politics,
219 and we must insist that Senators take a stand, come out in the open, and let the public
220 know what you really think, instead of just wiling away their time and patience as we
221 lose their confidence.

222 Thank you, Mr. Chairman and members of the Committee, for inviting me to
223 testify today and, more importantly, thanks for holding this critical meeting.

224 [The prepared statement of Senator Lautenberg was submitted for the record.]

225 Chairman Schumer. Thank you, Senator Lautenberg, for your excellent
226 testimony and even more excellent idea.

227 Senator Bennet.

228

229 **STATEMENT OF THE HONORABLE MICHAEL BENNET, A UNITED STATES**

230 **SENATOR FROM THE STATE OF COLORADO**

231 Senator Bennet. Thank you, Mr. Chairman.

232 Mr. Chairman, Ranking Member Bennett, my fellow witness Senator Lautenberg,
233 and members of the Committee, I am pleased to have the opportunity to talk with you

234 about solutions I propose to an important problem that impedes our Government's
235 ability to respond to the needs of American families. I am talking about the Senate's
236 rules. The Senate's rules are intended to encourage the body to function collegially,
237 protect the rights of individual Senators, and foster debate. Yet a few of these rules
238 are actually having the real-world outcome of inhibiting all of those legitimate purposes.

239 The pervasiveness of the filibuster deployed every day for multiple purposes in
240 this body has started to cause the Senate to descend into complete dysfunction. I am
241 not here to advocate banning the filibuster. The Senate can and must protect
242 individual or small groups of Senators, and filibusters, used properly, can extend debate
243 on important matters while members advocate for their constituents and engage in the
244 battle of ideas that is the hallmark or should be the hallmark of this body.

245 Yesterday's failed procedural vote on Chairman Schumer's campaign finance
246 legislation is the perfect example, in my view, of the abuse of Senate rules. The
247 filibuster, deployed for years to extend debate in the Senate, sometimes for a whole day
248 at a time, actually is now being used to undermine even having debate. By
249 filibustering the ability of the Senate to begin debate on the DISCLOSE Act, yesterday's
250 minority denied the American people a full airing of the recent Supreme Court decision
251 in Citizens United v. FEC and how that decision might affect our democracy.

252 I have introduced Senate Resolution 440 that in a very practical way would have
253 ensured that we could have moved ahead to the debate stage on the DISCLOSE Act.
254 By making motions to proceed undebatable, my resolution eliminates filibusters that,

255 rather than extend debate, actually are abused to prevent debate. My resolution
256 would help the body operate more efficiently. Making motions to proceed
257 non-debatable is a practical step in the right direction that is worth incorporation in a
258 larger Senate Rules Committee package of suggested rules amendments.

259 Another type of filibuster that prevents rather than extends debate is the hold.
260 Holds are the most antidemocratic form of the filibuster because just one Senator can,
261 even in a secret manner, block Senate business for long stretches of time.

262 Senate Resolution 440 makes significant improvements to the holds process,
263 including eliminating the secret hold.

264 My approach would require holds to be published in the Congressional Record,
265 require them to be bipartisan at that time. They would be limited to 30 days.

266 Neither party will be able to place secret holds. It is important that citizens
267 have the ability to find out why things do not get done in Washington.

268 Mr. Chairman, my fellow witness Senator Lautenberg has some very interesting
269 ideas about how to ask more of the filibustering Senators who seek to block legislation.
270 I would like to discuss the reform proposal in my resolution on this matter as well.

271 The Senate's rules effectively require an affirmative 60 Senators to vote to end
272 debate on an item. Yet members in the minority do not even have to show up or vote
273 to continue on with a filibuster.

274 My resolution would actually require at least 41 Senators to show up and vote to
275 block cloture, or else the legislation could move forward. If you want to block the

276 majority from moving ahead, then you at least ought to be required to show up for the
277 vote.

278 An atmosphere of overly bipartisan gridlock has rendered this body too often at
279 an impasse. I think the rules are contributing to this hyper-partisanship, only making a
280 difficult environment for working across the aisle that much harder.

281 Mr. Chairman, the American people want to see their elected representatives
282 work together. There is a sense, often a correct sense that the parties are trying to
283 score political points instead of attending to the people's business.

284 We conduct votes with very, very partisan outcomes, and filibusters serve only
285 to dig members in on one side or the other.

286 My resolution is in part an effort to build in some incentives to help the Senate
287 work through legislative impasses in a more constructive, bipartisan manner.

288 These proposed rule changes address situations where the legislative process
289 has already begun to break down. Following three failed attempts at ending a
290 filibuster, new incentives are activated that should encourage the parties to negotiate.

291 First, the 41-vote threshold that the filibustering minority must meet in order to
292 maintain the filibuster under my proposal would increase to 45 Senators unless the
293 minority is able to attract at least one Senator who caucuses with the majority to vote
294 for the filibuster. This provides considerable incentives to the minority to keep an
295 open dialogue and work with members of the other party. I believe building in this
296 incentive can have a positive marginal effect on minority negotiations with members of

297 the majority.

298 A second piece of the resolution builds on this first one. Once the minority has
299 convinced a member of the majority party to support a filibuster, then the threshold
300 necessary to block cloture can still rise to 45 if the majority is able to attract three
301 members of the minority to support cloture. So the Majority Leader, able to make
302 substantive changes to the legislation at hand, now has incentives to negotiate with
303 members of the minority in the hope that he can break the filibuster with their help.

304 While rules changes cannot fix Washington culture, they can reduce the
305 incentives for the inertia that too many times since I have gotten here has left the
306 Senate in paralysis.

307 Encouraging bipartisanship through the Senate rules is at best only a partial
308 answer, but I believe that improving some of the rules under which this body functions
309 can begin to replace some of the bad habits Washington has developed with better
310 ones.

311 The single most important thing we can do to improve the chance for success of
312 a reform proposal is to get the partisan intent out of it. We need substantial bipartisan
313 support to update the Senate's rules, so let us put together a package that would
314 improve the rules whether you are in the majority or in the minority. And let us make
315 it crystal clear that that is our intent.

316 My resolution has been cosponsored by Senator Shaheen, and it is my sincere
317 hope that some of them will be incorporated in a bipartisan reform package that can

318 pass this body.

319 Thank you again, Mr. Chairman, and to all the members of the Committee, for
320 conducting this important hearing.

321 [The prepared statement of Senator Bennet was submitted for the record.]

322 Chairman Schumer. Again, these are very interesting ideas. I know you,
323 Senator Bennet, have been pushing this for a long time, even before most people have
324 focused on it. Speaking, I think, for all of us, we are going to pay careful attention to
325 the ideas that you have put forward as well as the proposal of Senator Lautenberg.
326 These are two excellent testimonies that will help guide us. We thank both of you for
327 being here.

328 Senator Bennet. Thank you, Mr. Chairman.

329 Senator Lautenberg. Thank you, Mr. Chairman.

330 Chairman Schumer. Okay. Do any other members wish to make opening
331 statements? Feel free.

332 [No response.]

333 Chairman Schumer. Okay. Then let us move on to our second panel of
334 witnesses.

335 Senator Udall. Thank you, Mr. Chairman. I would just ask to put my opening
336 statement in the record.

337 Chairman Schumer. Thank you, and without objection, it will so be put, if that
338 is grammatically correct.

339 [The prepared statement of Senator Udall was submitted for the record.]

340 Chairman Schumer. Okay. Well, welcome to our three panelists, and let me
341 introduce all three of you, and then we will proceed.

342 Our first witness is Professor Gregory Koger. Professor Koger is an associate
343 professor of political science at the University of Miami. He specializes in the study of
344 Congress, elections, political history, and political institutions. He recently authored
345 the book, very timely for these hearings, *Filibustering: A Political History of*
346 *Obstruction in the House and the Senate*. Professor Koger previously worked in
347 Congress and received his Ph.D. in political science from the University of California at
348 Los Angeles.

349 Speaking of the University of California at Los Angeles, Professor Barbara Sinclair
350 is the Marvin Hoffenberg Professor of American Politics Emerita at UCLA. She
351 previously served as Chair of the Legislative Studies Section of the American Political
352 Science Association. Professor Sinclair is the author of several books on the U.S.
353 Senate, including *Party Wars: Polarization and the Politics of National Policy Making* and
354 *Transformation of the United States Senate*.

355 Our third witness is Ms. Elizabeth Rybicki. Ms. Rybicki is an analyst on the
356 Congress and legislative process for the CRS. She was previously a research fellow at
357 the Brookings Institution and a specialist in congressional history and political science at
358 the National Archives and Records Administration, where I was just at, dedicating the
359 Roosevelt papers, which, by the way, I would note to my colleague Senator Durbin,

360 Anna Roosevelt was there and said to say hello and thank you for your help in that
361 regard. She is your constituent.

362 So each of you will have your entire statement read in the record. Please
363 proceed as you wish. We will try to limit each testimony to about 5 minutes. Thank
364 you. Professor Koger, you go first.

365

366 **STATEMENT OF GREGORY KOGER, ASSOCIATE PROFESSOR POLITICAL**
367 **SCIENCE, UNIVERSITY OF MIAMI, CORAL GABLES, FLORIDA**

368 Mr. Koger. Thank you, Senator Schumer, and thanks to the Rules Committee
369 for the opportunity to discuss filibustering and the Lautenberg proposal.

370 I want to briefly stress two points I make in my written testimony. First,
371 filibustering, as you know it, is a very recent development. If this Committee wants to
372 make reforms, it is important to understand how and why filibustering became the
373 norm and not the exception in the U.S. Senate.

374 Second, I want to discuss Senator Lautenberg's proposal, which I think would
375 help to even the playing field by simplifying the cloture process.

376 First, how did we get here? For the first 170 years of Senate history, a filibuster
377 meant that Senators had to actually occupy the floor of the Senate to prevent a final
378 vote on a bill or nomination. Senator Byrd stated this nicely in his testimony before
379 this Committee this year when he said, "For most of the Senate's history, Senators
380 motivated to extend debate had to hold the floor as long as they were physically able.

381 The Senate was either persuaded by the strength of their arguments or unconvinced by
382 either their commitment or their stamina. True filibusters were, therefore, less
383 frequent and more commonly discouraged due to every Senator's understanding that
384 such undertakings required grueling, grueling personal sacrifice, exhausting preparation,
385 and a willingness to be criticized for disrupting the Nation's business.

386 This classic style of filibustering is portrayed fairly accurate in the movie "Mr.
387 Smith Goes to Washington." They actually consulted with the Senate Parliamentarian
388 as they were doing the movie. However, by the 1960s, Senators no longer had the
389 patience to wage these classic wars of attrition. The Senate had too much public
390 business to attend to, and individual Senators were too busy traveling back to their
391 States or around the country to take part in prolonged floor fights.

392 Instead, they began using a then-dormant cloture rule that had been around
393 since 1917 but had fallen into disuse. This shift from attrition to cloture had severe
394 unintended consequences.

395 First, filibustering became less visible, so Senators were less accountable for
396 their obstruction.

397 Second, filibustering became much easier. As Senator Byrd said, just the
398 whisper of opposition brings the world's greatest deliberative body to a grinding halt.
399 It is cheap and effective to prevent actions, so Senators do it more often.

400 Third, the current cloture rule was designed for us on rare occasions in a
401 slow-paced chamber. The delays built into the cloture process are too long and too
402 costly given the breadth of obstruction in the modern Senate. This is the problem that
403 the Lautenberg proposal addresses. Essentially it reduces the delay built into Rule XXII
404 in cases where no Senator is interested in discussing the targeted measure.

405 After cloture has been filed, it is in order for the Majority Leader to move that
406 the vote on cloture begin immediately as long as, A, no Senator seeks recognition to
407 speak and, B, Senators have had a full opportunity to file amendments. Furthermore,
408 if cloture is invoked on a nomination or a motion to proceed--which, of course, cannot
409 be amended--the same principle applies. If no Senator seeks recognition to speak, the
410 Majority Leader can initiate a final vote on the nomination or motion.

411 In my view, this is exactly the sort of proposal the Committee should be
412 considering. Like many members of the Committee, I appreciate the benefits of
413 selective obstruction to ensure fair and open debate, to promote moderate and
414 bipartisan solutions, and to force new issues onto the Senate's agenda. But the
415 current system is far too biased towards inaction by the ease with which Senators can
416 filibuster and the difficulty and delay in bringing debate to a close.

417 The resolution, Senator Lautenberg's resolution, does not alter the three-fifths
418 threshold for cloture but merely helps the Senate to decide if a bill or nomination has
419 enough support to clear that threshold.

420 This proposal would ensure that delay occurs only as long as there is some sort

421 of debate on the Senate floor. If Senators are not speaking against the obstructive
422 measure, then no one is deprived if debate time is cut short.

423 Personally, I think this proposal would be most effective and fair when combined
424 with enforcement of the Pastore rule, which requires that debate be germane to the
425 pending measure for at least 3 hours a day. That way Senators who are opposed to a
426 measure could only delay a cloture vote by providing an explanation for their
427 obstruction.

428 Thank you.

429 [The prepared statement of Mr. Koger was submitted for the record.]

430 Chairman Schumer. Thank you, Professor Koger.

431 Professor Sinclair.

432

433 **STATEMENT OF BARBARA SINCLAIR, MARVIN HOFFENBERG PROFESSOR**
434 **OF AMERICAN POLITICS EMERITA, DEPARTMENT OF POLITICAL SCIENCE,**
435 **UNIVERSITY OF CALIFORNIA, LOS ANGELES, CALIFORNIA**

436 Ms. Sinclair. Thank you for inviting me to testify. My task, as I understand it,
437 is to tell you what my research reveals about the impact of Senate extended debate rule
438 and practices on Senate decision making and about how partisanship has conditioned
439 that impact.

440 Your task is especially difficult because it involves weighing cherished values
441 against one another. Most everybody agrees that, to function well, a legislative

442 process needs to strike a balance between deliberation and inclusiveness, on the one
443 hand, and expeditiousness and decisiveness, on the other. Now, there is a lot less
444 consensus about what the optimal balance is and about what rules would best
445 implement that balance.

446 Well, to summarize my research briefly, I find that the use of extended debate
447 and of cloture to cope with it began to increase well before the parties became highly
448 polarized. However, as partisan polarization increased, so did the likelihood of major
449 legislation encountering some sort of extended debate-related problems in the Senate,
450 and this is a big increase, from 8 percent in the 1960s, to 27 percent in the 1970s and
451 1980s, then to 51 percent for the 103rd through the 109th and 70 percent in the 110th.
452 That is, the last full Congress, 70 percent of major legislation encountered some sort of
453 filibuster-related problem.

454 Second, the Senate, at least according to the measures that I have available, is
455 more likely to produce legislation that incorporates minority preferences than the
456 House. That can be seen as the upside of current Senate rules. However, heightened
457 partisan polarization has significantly affected legislative productivity in the Senate.
458 The Senate has a lot more difficulty passing legislation than the House does. In the
459 pre-1990s period, major measures were just about as likely to pass the Senate but then
460 not pass the House as vice versa. In the more partisan period--and I mean the 103rd
461 through the 110th--this has really changed dramatically--from only 1 percent of major
462 measures pass the Senate but not the House; 20 percent pass the House but not the

463 Senate. The House Democrats' frustration is understandable in those terms. Finally,
464 partisan polarization depresses legislative productivity in the Senate mostly through the
465 increased use by the minority party of extended debate.

466 Now, because it is still in session, I do not have data for the 111th, but it does
467 look likely there some of these records will be broken. So my research suggests that if
468 current minority party practices continue when the majority party's margin is smaller,
469 whichever party is the minority and the majority, the Senate really is in danger of near
470 gridlock, of being incapable of legislating without so much difficulty that nothing much
471 of significance gets done. The chamber already fails to pass most of its appropriations
472 bills as individual bills simply because it does not have the floor time. So perhaps it is
473 time for the Senate to consider whether the balance between deliberation and
474 decisiveness has tilted too much away from decisiveness. Certainly supermajority
475 requirements have a much greater impact on the chamber's ability to legislate in a
476 context of high partisan polarization than it did when the parties were polarized.

477 So rules that encourage by bipartisanship or ways of encouraging bipartisanship
478 are certainly worth looking at. I am a little unclear about the extent to which rules can
479 do that because I think the roots of partisanship are deeper than that. I think both the
480 Bennet and Lautenberg rule proposals are very useful to look at in the terms of putting
481 more of the burden on those who want to stop legislation versus those who want to
482 actually move it. Now the burden tends to be all on the side of those who want to go
483 further.

484 Thank you.

485 [The prepared statement of Ms. Sinclair was submitted for the record.]

486 Chairman Schumer. Thank you, Professor Sinclair.

487 Ms. Rybicki.

488

489 **STATEMENT OF ELIZABETH RYBICKI, ANALYST ON THE CONGRESS AND**
490 **LEGISLATIVE PROCESS, CONGRESSIONAL RESEARCH SERVICE, LIBRARY**
491 **OF CONGRESS, WASHINGTON, D.C.**

492 Ms. Rybicki. Mr. Chairman, Senator--

493 Chairman Schumer. Could you move the microphone? Thank you.

494 Ms. Rybicki. Mr. Chairman, Senator Bennett, and members of the Committee, I
495 am truly honored to have been invited to testify before you today on these two
496 proposals to amend Senate rules.

497 I would like to say at the outset that the procedure experts at the Congressional
498 Research Service work as a team, and I want to thank them, first and foremost among
499 them Rick Beth, for their assistance.

500 Both of the resolutions under discussion today--Senate Resolution 440 and
501 Senate Resolution 465--require some clarification and elaboration before the
502 Committee could fully evaluate their impact. To assist the Committee in this
503 evaluation, in my submitted testimony I ask a series of questions to indicate possible
504 areas of ambiguity in the implementation and interpretation of these rules.

505 For example, Senator Resolution 440, submitted by Senator Bennet of Colorado,
506 proposes a way for a supermajority of the Senate to expedite the cloture process. It
507 first creates a motion to reduce the 2-day ripening period by a two-thirds vote. Would
508 this motion set the date and time for the cloture vote? Or would it specify the number
509 of hours remaining? Would the motion be amendable? Could the ripening time be
510 reduced to zero, allowing an immediate vote on cloture and preventing any
511 amendments from being filed? Perhaps more centrally, is the motion itself debatable?
512 I assume it is intended to be non-debatable because otherwise you would need the
513 cloture process to end debate on the motion, and that would kind of defeat the
514 purpose.

515 This same resolution also creates a motion to reduce the 30-hour post-cloture
516 time by a three-fifths vote. The resolution in this case explicitly states that the motion
517 is not debatable. But is it amendable? And could this motion reduce the post-cloture
518 debate time to zero and prevent Senators from offering amendments?

519 Depending on the interpretation of the resolution, it might be the case that,
520 taking the various provisions together, a supermajority of the Senate could prevent
521 debate and amendments and bring the chamber to a vote on a measure with just four
522 votes: First, the vote on the motion to proceed, which under Section 1 is not
523 debatable, as we heard. The Senate would then be on the matter, cloture could be
524 filed, a motion could be made to reduce the ripening period, and a two-thirds vote of
525 the Senate could reduce that to zero. The Senate would then vote on cloture, and

526 then a motion could be made to reduce the post-cloture consideration time to zero.

527 And in this way, with four votes, the Senate could immediately vote on the question of
528 final passage, something the Senate does in terms of passing measures quickly, but by
529 unanimous consent under current procedures. And this on one interpretation might
530 allow a supermajority to do that.

531 The other resolution under discussion today, Senate Resolution 465, submitted
532 by Senator Lautenberg, similarly seeks to create a method to expedite the cloture
533 process. This resolution provides that the Majority Leader can "move the question on
534 cloture" if no Senators are willing to engage in floor debate during the 2-day ripening
535 period. Is the intent of the resolution to create a new motion that the Senate would
536 then vote on whether or not to vote on cloture? Or is it the intent of the motion that
537 the Majority Leader would effectively announce that it is time to vote and the Senate
538 would vote immediately, as long as no Senator is seeking recognition?

539 Under current Senate procedures, it is already the case that if no Senator is
540 seeking recognition, the presiding officer will put the question--a natural practice, of
541 course, as Senators know, an accommodation generally made to allow Senators who
542 wish to speak to come to the floor at their convenience.

543 How, then, will this resolution alter existing practice? Is it the intent of the
544 resolution that by giving this new authority to the Majority Leader this will discourage
545 these practices that have developed in the Senate? And if it does discourage the
546 practice, will it expedite the cloture process?

547 One effect of the process established in the resolution could be to increase the
548 actual floor time spent on a matter before a cloture vote. Under current Senate
549 practice, the Senate often conducts other business during the 2-day ripening period, and
550 then the vote to invoke cloture brings that matter back before the Senate.

551 The resolution as submitted would require that the matter remain pending
552 before the Senate during that 2-day ripening period. Is it the intended operation of
553 the rule that if the Majority Leader wanted to reduce the ripening time, the Senate
554 could not conduct other business and the Senate Majority Leader would have to stay on
555 the floor the day after cloture was filed from 1:00 p.m. until adjournment, hoping that
556 Senators stop speaking so that he could make this proposal to move the question on
557 cloture.

558 In the interest of time, Mr. Chairman, I will stop there. My submitted
559 testimony has additional questions about other provisions, including those concerning
560 Section 3, which deals with holds, which is the subject of another hearing. I will be
561 happy to discuss other provisions of the resolutions if you have questions.

562 I would conclude by saying, as members of the Committee know better than I,
563 that evaluating the effect of any rules change on Senate procedure and practice can be
564 very challenging. The impact of rules in the Senate is sometimes not directly
565 observable since much of the time Senators do not need to actually exercise their
566 procedural rights because they are accommodated in negotiations over unanimous
567 consent agreements as well as in norms of Senate practice.

568 It is also difficult to assess the proposed consequences of rules because it is hard
569 to anticipate all courses of proceeding and context in which the new rule may be
570 applied.

571 I hope posing these questions concerning implementation and interpretation of
572 the submitted resolutions here today and in my written testimony can assist the
573 Committee in its evaluation.

574 [The prepared statement of Ms. Rybicki was submitted for the record.]

575 Chairman Schumer. Well done. There are a lot of questions, as you have
576 posed. Okay.

577 My first question, and we will try to take 5 minutes and then we will go to a
578 second round if members so wish, is to Professor Koger. Do you actually believe that
579 Senator Lautenberg's proposal would change the number of actual filibusters? That is
580 the fundamental question. And, second, would it alter the number of secret holds as
581 well?

582 Mr. Koger. I am not sure. I think the--

583 Chairman Schumer. I think Senator Lautenberg would probably argue it would.
584 I cannot speak for him, but I am sure he would say yes, at least on the first and probably
585 on the second, too.

586 Mr. Koger. To reduce the number of filibusters, I think that is certainly the
587 intent. In practice, yes. I mean, so any Senator who is--especially placing a hold that
588 that Senator would not want to defend publicly or argue on behalf of, that sort of hold

589 would probably--Senators would probably think twice about filing that sort of hold.

590 Chairman Schumer. A secret hold.

591 Mr. Koger. Right.

592 Chairman Schumer. And what about on filibusters themselves?

593 Mr. Koger. I do not know that it would reduce the number of filibusters. It
594 would probably make it easier for the Senate to churn through sort of--filibusters
595 against minor legislation, so the Senate has to spend less time, you know, on
596 nominations to lower-level positions, Cabinet positions. So I think the primary goal is
597 to make it easier for the majority to deal with the filibusters that it has now.

598 Chairman Schumer. Do either of you have an opinion on that, Professor Sinclair
599 or Ms. Rybicki? Go ahead, Ms. Rybicki. Assuming the answer to most of your
600 questions, which were very good, is answered in the way of shortening the amount of
601 time necessary, and not saying, well, we could go for another vote on deciding this, this,
602 or the other thing.

603 Ms. Rybicki. Mr. Chairman, I was just going to say the Congressional Research
604 Service does not take an opinion, and I cannot answer the question.

605 Chairman Schumer. I know.

606 [Laughter.]

607 Chairman Schumer. How about Ms. Rybicki? No. I do not want to put you
608 on the spot. Go ahead.

609 Ms. Rybicki. My mentor at the Congressional Research Service was once asked

610 by the House Rules Committee Chairman what he thought, and he responded, "I am not
611 allowed to think."

612 [Laughter.]

613 Chairman Schumer. Professor Sinclair, you are allowed to think?

614 Ms. Sinclair. As Elizabeth Rybicki said, if we--

615 Chairman Schumer. Just pull the microphone forward, please.

616 Ms. Sinclair. It really can be difficult to kind of trace the effects of a rule
617 because it--I mean, all those little ramifications that seem so minor initially might come
618 back and bite you. But it does seem as if the likelihood is that you would, in fact, get
619 debate. You know, I posed it as kind of deliberation versus decisiveness, but it seems
620 in many cases now you have the worst of all possible worlds.

621 Chairman Schumer. We do not have much deliberation, and we do not have
622 much decisiveness.

623 Ms. Sinclair. Right, right. And often you are not even talking about what it is
624 that is at base in contest. And while pretty clearly if the Majority Leader has to get 60
625 votes for everything, well, that is an enormous incentive then to use procedures like
626 filling the amendment tree so as to prevent amendments. I mean, you have got to do
627 the 60 anyway. Why should you then allow the others to amend things?

628 Chairman Schumer. And that is the debate we have been having back and forth
629 on each side here as we have gone through these hearings.

630 Let me ask you a separate question. Senator Bennet makes a real effort to say,

631 well, if you are going to use this process, there ought to be an incentive for some degree
632 of bipartisanship. What did you think of his specific proposals and more broadly the
633 idea of saying, well, if you get someone or a small number from the other party, there is
634 an incentive for you?

635 Ms. Sinclair. I am a little pessimistic of the ability of rules to promote
636 bipartisanship. I do think that the roots of the current partisanship are, you know,
637 much greater and deeper than simply a matter of something that could be solved by
638 rules. You know, if it were easier to change Senate rules, one might say, well, why not
639 try it? And shall we say at this point I am grateful that this is your decision and not
640 mine.

641 As I said, I think that both of these proposals have the intent and I think probably
642 the effect of putting more of the burden in this process on those who want to stop
643 things, and I think that is a good idea, and also to some extent make that more
644 transparent.

645 You know, to the extent that you get a robust debate, there is at least some
646 chance that there will be some public engagement and that things will be decided on
647 the basis of, if not rational arguments, at least arguments.

648 Chairman Schumer. Thank you.

649 Senator Bennett.

650 Senator Bennett. Thank you very much. I have enjoyed your testimony.

651 A quick comment Professor Sinclair. You made reference to the appropriations

652 bills and how in recent years they have ended up in either an omnibus bill or a
653 continuing resolution. I am a member of the Appropriations Committee, and I can
654 remember the first time we got to an omnibus bill. It was not because the Senate did
655 not pass the bills. It was because the House did not appoint conferees, and we never
656 got bills that could go to the President. So the ability to delay--and, frankly, it was a
657 Republican House and a Republican Senate, so I am criticizing my own colleagues here.
658 The ability to obstruct is not unanimously and solely part of the United States Senate.

659 The core here of what I think we have been talking about is the decision to move
660 to a dual track. If we go back to "Mr. Smith Goes to Washington" and Senator
661 Lautenberg that was the way filibusters always were. When I was a staffer here and
662 my father was in the Senate and a filibuster would come, he would get out the cots.
663 Everybody has to be on the floor. It was "Mr. Smith Goes to Washington" time. And
664 at some point--and I do not know who the Majority Leader was--we got into the position
665 of a dual track so that, okay, we file a cloture motion; now we move--the Majority
666 Leader has the right to move to other business, and so you can have what you have
667 been decrying here: the circumstance where a filibuster has been set in motion, but
668 the Senate continues to function. And if we did away with the dual track, which is
669 what the Lautenberg proposal does, says as soon as a filibuster has started, nothing else
670 is in order, then you do have the "Mr. Smith Goes to Washington," but the Senate
671 cannot function, cannot take up any other business.

672 I would like you to comment about the wisdom of being in that situation. I

673 remember as a very freshman Senator we mounted a filibuster against one of President
674 Clinton's proposals, and Senator Dole said, Okay, we are in it, and put up the chart, and
675 we all signed up for a time. And I was junior enough that my time was 2 o'clock in the
676 morning.

677 [Laughter.]

678 Senator Bennett. And so I showed up just before 2 o'clock, took that whole
679 hour. There was one Democrat on the floor to make sure I did not make some
680 outrageous unanimous consent request so that he could object. He came out of the
681 cave in the Democratic cloakroom to complain that I was reading a newspaper column
682 and, therefore, it was not germane and should be struck down. And I pointed out that
683 the newspaper column was on the subject we were debating, and the Chair ruled in my
684 behalf.

685 You know, so, yes, we have done that and we can do that and the minority can
686 mount that, but the Senate cannot function when we are doing that.

687 Comment on whether or not moving to that single track that used to be the
688 norm is really going to improve getting legislation through the Senate.

689 Ms. Sinclair. I think it was Mansfield, Majority Leader Mansfield that went to
690 the dual track.

691 Senator Bennett. It would not surprise me. He was a very reasonable man.

692 Ms. Sinclair. And your point, I think is extremely well taken, and, you know, a
693 lot--and this gets back to, say, all these attempts to deal with holds. Well, you know,

694 holds are not in Senate rules. The Majority Leader does not ever have to, in fact--

695 Senator Bennett. If we could move--we held a whole hearing on holds.

696 Ms. Sinclair. Yes.

697 Senator Bennett. I do not mean to be disrespectful.

698 Ms. Sinclair. Oh, yes.

699 Senator Bennett. But let us talk about this other question rather than holds.

700 Ms. Sinclair. But the real problem, of course, is the Majority Leader is trying to

701 get things through the Senate. There is limited time on the floor, and so you end up

702 going to things like the dual track because it makes it a little more possible to get certain

703 business done. But it then encourages these other uses of the rules to stymie other

704 things, including this kind of hostage taking where you are stymieing one nomination or

705 one bill because you really are upset about something else. So the question is: How

706 can you somehow get this all where the incentives are not to use the rules to block

707 unless it is really something very important that you are willing to go to the mattresses

708 on?

709 Senator Bennett. Mr. Chairman, could we Professor Koger--I know my time is

710 up, but--

711 Chairman Schumer. That is okay.

712 Mr. Koger. Yes, please. Quickly, on the Lautenberg proposal, the way I

713 understand it is it would create an option for the Majority Leader to require what you

714 would call a single track debate, you will stay on the issue that is being filibustered.

715 But as Ms. Rybicki has noted, often the Senate will switch to other issues after the
716 cloture petition has been filed, and that would still be around as an option.

717 If the majority party would prefer to stick on an issue and compel the
718 obstructionist to actually debate the issue, then that would be an option that they could
719 use. But it would not be mandatory in every single case.

720 Senator Bennett. So the Lautenberg proposal preserves the right to move on
721 the dual track.

722 Mr. Koger. Yes.

723 Senator Bennett. I see.

724 Thank you, Mr. Chairman.

725 Chairman Schumer. Senator Durbin.

726 Senator Durbin. Thanks, Mr. Chairman.

727 I guess when I moved from the House to the Senate I was looking forward to
728 Senate debate. Think about it, the greatest deliberative chamber in the world and all
729 the history that went with it. And the first time I had a chance to offer an amendment
730 on the floor, and the staffer came up to me and said, "You have one hour," I said, "Is
731 that equally divided?" And she said, "No. You have one hour."

732 [Laughter.]

733 Senator Durbin. I thought, "What am I going to do with one hour?" So I said
734 the Republican Senator on the other side, can I ask unanimous consent that we split this
735 up and that we debate this back and forth?" And he said, "I object." And I started to

736 realize that this may not be the great debate chamber.

737 So today I would argue that the Senate is not only not functional, it is not very
738 interesting. To have debate break out on the floor of the Senate is--you know,
739 somebody put out a press release. Two Senators are actually engaging one another in
740 exchange of ideas. And so I think there is something that we have to get to, and it is
741 not just whether this place functions and produces debt which leads to votes and
742 perhaps legislation, but actually has a process that engages thinking and expression of
743 thought. And I do not think this process does it.

744 Now, the fear that all of us have, whether we are sitting on that side or this side,
745 is, What if the tables are turned? What if they become the majority and we want to
746 stop them? You know, if we change the rules, we are going to have to live with it.
747 We may accommodate changes on the rules that make it easier.

748 So it is that basic fear, concern, that I think guides us on this in terms of how far
749 we want to go. But I would argue at this point we have to do something. There is
750 something fundamentally wrong with this institution.

751 I read a book which some friends sent to me. Francis Valeo, who is a former
752 Secretary of the Senate, if I am not mistaken, wrote this biography of Mike Mansfield,
753 and the most interesting thing I ran across was a story in 1962 when Wayne Morse
754 decided to filibuster the Communications Satellite Act of 1962. And the interesting
755 thing was this was odd that a liberal was going to initiate a filibuster. To that point, the
756 conservatives and Southern Democrats had been using filibusters to stop civil rights. In

757 comes Morse who said, "I am going to filibuster the Communications Satellite Act
758 because I think it is a monopoly, and I am for public ownership," and so forth. And so
759 they test it.

760 Well, here is how it ended. I thought the ending was the best part of it. He
761 lost. Cloture was invoked. And the interesting--it was 73-27. Another
762 consequence, Valeo writes, of the Morse cloture vote was that the entire Senate had
763 witnessed the successful operation of Rule XXII to end the filibuster. Previously, only
764 Hayden of Arizona could claim that distinction. It was the first time in 35 years that the
765 Senate had voted to shut off debate and only the fifth time in its history, 1962.

766 Now look where we are. We face it every day, almost every day.

767 Can I get to a practical question? One of the things that stops movement of
768 debate and discussion on the floor is the quorum call, and right now the Majority Leader
769 can come in and he can lift the quorum call. But ordinary Senators cannot. One
770 Senator can object, and the quorum call just continues.

771 I will ask Ms. Rybicki first. Did you find in any of these rule changes a way to
772 address that question about how you actually get the floor?

773 Ms. Rybicki. Senator Bennet's proposal, Senate Resolution 440--no, I am sorry.
774 It is Senate Resolution 465, Senator Lautenberg, does have in it against dilatory quorum
775 calls. That term is not defined, so I just have more questions whether the intent is to
776 have the presiding officer decide whether it is a dilatory quorum call and, if so, on what
777 grounds. Would that decision be subject to appeal? Is that appeal debatable? But

778 it is mentioned in Senate Resolution 465.

779 Senator Durbin. Back in a previous life, I was a Parliamentarian of the Illinois
780 State Senate for 14 years, and I wrote the rule book, and it was such a joy. It was like
781 writing the Tax Code. I could always find a provision to take care of my needs.

782 [Laughter.]

783 Senator Durbin. And I loved your questions because they start thinking about
784 where we go. We now are embarking on a new thing that is being used by the
785 Republican side, and that is suspend the rules after cloture is invoked. We are getting
786 a long list of motions to suspend the rules to bring up a lot of different topics.

787 The point I am making is you raise a lot of practical, good questions about how
788 these things will work, and if we are not careful, there will be some other opening in our
789 rule book which will allow more efforts to delay, divert the efforts of the Senate to
790 reach some sort of conclusion.

791 But I have come to the point, even though I think we have had one of the most
792 productive sessions in history, I have come to the point that if this is going to be an
793 enjoyable experience for Americans as well as for Senators, I think we need
794 fundamental change. I think Michael Bennet and Frank Lautenberg are on the right
795 track, and I thank you for your testimony.

796 Chairman Schumer. Senator Roberts.

797 Senator Roberts. Thank you, Mr. Chairman. I was just wondering what a repeat
798 performance would be like by Robert C. Byrd, our great colleague and Senator who

799 made an appearance before this Committee. You were very eloquent in describing his
800 contributions to the process. And if there was ever a person who defended the
801 filibuster, it was Robert C. Byrd and what he would be saying. I am not trying to say I
802 am going to emanate that example or try to duplicate what he would say.

803 Mr. Koger, you state in your testimony filibustering has skyrocketed. You
804 describe it as obstructionism. There are others of us that would say that it would be
805 better to stop a bill, i.e., it is important to pass legislation, but it is also to prevent bad
806 legislation from passing. And if this is the only tool you have in your toolbox, then it is
807 not obstructionism. It is preventing something that we do not want to see happen.

808 But based on the research you have conducted for your book, can you tell me
809 about the practice of filling the amendment tree, which I think is a big contributor to
810 why we have the filibuster?

811 Mr. Koger. Thank you, Senator. Briefly, I use the term "obstruction" just as a
812 descriptive term.

813 Senator Roberts. Yes, I know.

814 [Laughter.]

815 Mr. Koger. No, I mean, I use the term "filibustering" and "obstruction" just to
816 refer to the strategic use of delay to prevent an outcome on an issue. There is no
817 pejorative sense.

818 Anyway, filling the amendment tree. So one of the classic reasons for
819 filibustering both in the modern Senate and going back into the 19th century House is

820 because the minority of any sort is trying to prevent the majority from curtailing their
821 opportunity to--I will not say "debate," but to offer amendments. And, yes, I
822 understand that filling the amendment tree--

823 Senator Roberts. Well, how would you describe your relationship between
824 filling the tree and filibustering? One contributes to the other, I think.

825 Mr. Koger. Well, if you look at time trends, the explosion in filibustering started
826 at the end of--you know, starting in the 1960s, increased in the 1970s, precedes the
827 increased use of filling the amendment tree. So it may very well be true that one of
828 the incentives to filibuster in the contemporary Senate is a reaction against filling the
829 amendment tree. But certainly the explosion that we observe is not simply--

830 Senator Roberts. Wait. Wait a minute. Wait a minute. May be
831 contributing. We have in 18 months here--I serve on the HELP Committee, on the
832 Finance Committee, and have been through hundreds of hours of testimony, had 13
833 amendments that I wanted to offer, all in relation to health care rationing. All were
834 defeated on a party line vote or just said they were not germane. And the only vote
835 that I ever got was during reconciliation when I introduced an amendment that was first
836 introduced by Senator Schumer, who then turned around and voted against his own
837 amendment. Shame on the Chairman. But, anyway, I thought he had a great idea.
838 But at any rate, I had 1 minute. One minute. That was it. And today you can have a
839 very major overhaul of legislation. You do not go back to Committee. You do not
840 have hearings. We had the DISCLOSE Act. The Chairman did at least have some

841 debate on the floor, but we did not really debate it here in Committee, and I find that
842 true in almost every Committee I serve on.

843 So, consequently, the bill goes to the floor, and then we really do not have
844 debate on it on the floor. The Majority Leader and Charlie Rich, sitting behind closed
845 doors, and all of a sudden the bill appears, and we have not seen it. And it could be
846 2,000 pages, 2,300 pages, 2,600 pages, whatever. Usually the manager of the bill
847 indicates, well, we will find out when we pass it. And then we do not have any chance
848 to make any amendments. And so, consequently, what else do we do other than, you
849 know, file cloture? I mean, what do we do in this instance when regular order has
850 really sort of broken down?

851 Now, I understand that the people who are for this have an agenda, and they
852 believe in that agenda. They obviously would not do it if they did not believe in it.
853 Some may have a different point of view, like myself. And just as an example, we have
854 a situation here where we have a small business reform bill coming up, and the Leader is
855 considering amendments. One amendment I had was a sense of the Senate that we at
856 least ought to vote in the Finance Committee on the confirmation of Dr. Donald
857 Berwick, who is going to un health care. You would think that we would want to have
858 a vote on the confirmation. Well, the answer to that is no, we are not. We may have
859 a hearing on how he might run CMS. The distinguished Chairman is a member of that
860 Committee. But I want my vote.

861 Now, what recourse do I have? I guess I could go to the floor and I could put

862 the place in a quorum call, and if I have a lot of fortitude and can sit there for a long
863 period of time--or maybe pass it off to somebody else, but I am not sure that would
864 happen--I could maybe tie it up. We just had that example with Senator Lincoln in
865 regards to a bill where, in order to get out, we had to accommodate her down the road
866 in regards to an agriculture disaster bill. But she had to shut down the Senate, put a
867 crowbar in the whole place. And that is on the other side. I still want my vote on Dr.
868 Berwick, and what would you advise I could do here? Because we are filling the tree,
869 and one leads to the other.

870 Mr. Koger. Actually, this may be a case for Dr. Sinclair, because it gets to--
871 Senator Roberts. Well, please tell me what you think. I understand the
872 distinguished--

873 Chairman Schumer. Time has expired, so decide who should answer the
874 question, and we will move on.

875 Mr. Koger. Briefly, I mean, these are the problems of the combination of a
876 highly polarized congressional environment and rules that allow minority obstruction
877 and, you know, the majority then trying to short-circuit the exercise of minority rights by
878 the minority. And so these are the sort of things we observe.

879 Senator Durbin mentioned that, you know, he wonders what sort of rules
880 changes he would want if he were in the minority, and I think this is--since there has
881 been some switching back and forth of chairs and gavels, I think this might be an
882 opportunity for people to see the world from both sides.

883 Senator Roberts. Ms. Rybicki?

884 Chairman Schumer. Okay. Senator Udall.

885 Senator Roberts. Mr. Chairman, could I just make one observation? Ms.

886 Rybicki, I think it is, if you are not allowed to state what you think, you might want to

887 think about employment in the intelligence community.

888 [Laughter.]

889 Senator Roberts. Just a thought.

890 Chairman Schumer. Coming from the former Chairman of the Intelligence

891 Committee. Senator Udall.

892 Senator Udall. Thank you very much, Chairman Schumer, and thank you for

893 holding this hearing. I very much appreciate the witnesses today.

894 When I first arrived here--I also spent a number of years in the House, as some of

895 the other members that are on the Committee, and I was surprised--I had been

896 observing the Senate, but I was surprised when I arrived here about you talk about

897 decisiveness and deliberation, the lack of both. And I think that is really the key issue

898 here, is how we bring accountability back to the institution. And what I want to ask

899 you about in talking about accountability has to do with how hard it is to change the

900 rules.

901 I think, Ms. Sinclair, you at one point in your testimony said if it were easier to

902 change the Senate rules. Well, you know, who made these rules? Why are they here

903 and who voted on them? One of the remarkable things to me is that of the entire

904 Senate body, when we deal with Rule XXII, the last time it was changed was in 1975.

905 So two Senators were here, Senator Inouye and Senator Leahy, and that is it, of the

906 sitting Senator. Ninety-eight of us had nothing to do with the rules.

907 So if you had rules which could be established with every Congress every 2 years,

908 as the House does and most legislative bodies around the world or parliaments do

909 around the world, would you get more accountability? And what I am referring to

910 there is what I call the constitutional option. In the Constitution of the United States, it

911 says each House may determine the rules of its proceedings. Three Vice Presidents as

912 presiding officers have ruled that at the beginning of a Congress, you can, by a majority

913 vote, adopt the rules. And so if we proceed at the beginning of the 112th

914 Congress--which I intend to do. I am going to offer a motion to adopt rules for the

915 112th Congress on the first day. Wouldn't you think if we had a tradition of adopting

916 rules every 2 years, that would bring accountability to the system more than anything,

917 because each side would know if you really abuse the rules, you are going to have the

918 possibility they are going to be changed in 2 years.

919 Please, any of the witnesses who would like to answer.

920 Ms. Sinclair. Well, yes, I think that that is by far the most likely way of being

921 able to change the rules without doing, you know, serious damage to the institution, to

922 essentially reverse that precedent, whether it is the rule of the Senate or the continuing

923 body. And it would certainly provide a certain amount of flexibility, and in the end,

924 yes, I think one of the real problems is that with supermajorities required for just about

925 everything, it does make it hard for the public to hold anybody accountable for what
926 does or does not get done.

927 You cannot expect people, you know, who have to work and take care of their
928 kids and all that sort of stuff to become experts in Senate procedure. And so there is
929 that kind of "a pox on all of you" sort of sentiment when it seems that the Senate
930 cannot function.

931 Senator Udall. Mr. Koger?

932 Mr. Koger. Well, Senator Udall, the part I liked about the standing body
933 strategy in the mid-20th century was that it was an effort to force a critical vote on a
934 parliamentary ruling about whether or not--that if the reformers won, it would promote
935 their effort to change the rules of the Senate.

936 I think one of the problems they ran into is that when they put themselves in a
937 box of saying we can only do this at the beginning of a Congress, that then limited them.
938 What if actually their real incentive to change the rules happened in the middle of the
939 Congress and that is when they got really angry? Well, then, they would have to wait.
940 And often there are things to be done at the beginning of a Congress that then butted
941 up against their effort to have a long, prolonged debate about the rules.

942 As Dr. Gregory Walrow mentioned earlier, I mean, I hold the view that if you
943 have a committed and creative majority of Senators willing to go to the floor of the
944 Senate and vote for, you know, the right to parliamentary rulings, you can do that any
945 day, and I would not necessarily constrain yourself to the first few days of a Congress.

946 Chairman Schumer. Well, thank you. Senator Udall has been sort of pushing
947 this idea for a long time.

948 Senator Bennett and I talked about this. It is very relevant to the question that
949 Tom asked and you answered, Professor Koger. Is this different than the moments
950 with Bill Frist and the nuclear option? And the one big difference, if it makes a
951 difference, is this --the nuclear option was attempted in the middle of a session. And
952 at least it is my reading--and now I have read a lot on this, and I will be reading more
953 and we have had a hearing on this. But if there is a conflict between the two-thirds
954 rule and the constitutional provision that the Senate shall make its own rules, it is the
955 only time, in my judgment, and I guess I would disagree with you. I think Tom is in
956 agreement with me. I am not sure of this. The only time where the constitutional
957 provision might trump the Senate rule is in between sessions of Congress, because it is
958 awfully hard to do otherwise. Because you have an ongoing rule in the middle of a
959 session, but you just do not necessarily have an ongoing rule between sessions,
960 although I know the way the rule was constructed it almost goes in perpetuity.

961 But that is a debate we will be having. It is a fundamental question that we are
962 going to have to address. And I have to say this, there is even division within our own
963 caucus about this. So it is going to be something that is going to take a lot of work and
964 a lot of thought. I just wanted to say, before I call on Carte, about Ms. Rybicki's many
965 questions. It is true, we asked you a question and we get five back, and that is good.

966 [Laughter.]

967 Chairman Schumer. It shows how difficult this is and how much thought it all
968 involves, not just thought but there may be unintended consequences as well if you do
969 not think it through very carefully.

970 Do you want to say something, Senator Bennett, before we call on Senator
971 Goodwin?

972 Senator Bennett. When you said there are divisions in your caucus, I simply
973 wanted to add, "As there are in ours.

974 Chairman Schumer. Great. Senator Goodwin, is this your first time asking
975 questions at a hearing?

976 Senator Goodwin. I believe we are up to number three, Mr. Chairman.

977 Chairman Schumer. Number three, good. Well, so you are an old hand
978 already.

979 Senator Goodwin. A seasoned vet.

980 Senator Udall. And he was in the chair yesterday, so, you know, we are really
981 breaking them in here.

982 Senator Goodwin. That is right. Thank you, Mr. Chairman, and I would also
983 like to thank our panelists, including our Senate colleagues, Senators Lautenberg and
984 Bennet, for giving their time today and sharing their testimony.

985 I would also be remiss if I did not also acknowledge Senator Byrd's long service
986 to this Committee and to the State of West Virginia. Senator Byrd was a stalwart of
987 Senate procedure in history. He quite literally wrote the book on it, or at least a book

988 on it. And as a dean of the Senate, Senator Byrd understood the rules and procedures
989 of this body as well as anyone, and his love of this body was rooted in the deep
990 appreciation of those rules and procedures, including the filibuster.

991 I know that this Committee has been holding a series of hearings to examine this
992 issue, and I certainly look forward to getting up to speed and getting a better
993 understanding of the issue in the days ahead.

994 I have one very brief question for Professor Koger. In your testimony, you refer
995 to a shift from attrition to cloture. Talk a little bit about what prompted that shift and
996 to what extent the shift became formally embodied in the rules of the Senate.

997 Mr. Koger. Certainly, thank you. Well, if you remember back--I do not have it
998 here, but the picture of Mr. Smith filibustering, your focus is drawn to Smith, but in the
999 background there is a majority of the Senate waiting for him to collapse. And that is
1000 the trick, right? Because you had to have a quorum of the Senate present--

1001 Chairman Schumer. Those are called "extras."

1002 [Laughter.]

1003 Mr. Koger. But in real life, they are duly elected extras, you know, and you
1004 have to wait around day and night for whoever is filibustering to be exhausted.

1005 We have actually been talking about it indirectly. The critical period, I think,
1006 was in the 1960s when Mike Mansfield took over as Majority
1007 Leader and said that is a really stupid way to run the Senate because, you know, we
1008 have gotten to the point where it just does not. You cannot keep a majority around as

1009 long as, you know, 10, 15, 20 people are holding the floor. They will always win,
1010 because we are just too busy. We have other things to do. They have other places to
1011 be, and it is just not an effective way.

1012 Senator Durbin mentioned the COMSAT filibuster of 1962. Well, that was a
1013 pivotal moment because it was the first time cloture had been invoked in decades, and
1014 that moved--and part of that was that Senators who had always proclaimed that they
1015 were philosophically opposed to invoking cloture--"I would never do that," freedom of
1016 debate--well, lo and behold, when it is liberals doing the filibustering, their attitudes
1017 shifted a bit, and they voted for cloture. And that sort of changed the context in the
1018 Senate, and then the next big step would be the 1964 Civil Rights Act when for the first
1019 time you had cloture invoked on the Civil Rights Act, which had always been sort of in
1020 the background of people's thinking about cloture.

1021 So those two events then moved the Senate and the realization that attrition
1022 was just numbingly ineffective moved the Senate away from, you know, waiting out
1023 filibusters and towards, "Eh, we will see if we have enough votes."

1024 But as I argue in my testimony, that then had unintended consequences because
1025 they did not think through how that would change Senators' calculations as they are
1026 deciding whether or not to filibuster. It makes it too easy, and the existing cloture rule
1027 made it too difficult to invoke cloture on particularly minor things, you know, minor
1028 nominations, bills to change the names of post offices. I mean, anything that can be
1029 used as a hostage that does not invoke the passion of a majority of the Senate becomes

1030 an easy victim in this game.

1031 Senator Goodwin. Thank you, Mr. Chairman.

1032 Chairman Schumer. Thank you, Senator, and thank you, Panel. Thank you to

1033 my colleagues on behalf of the Rules Committee. Anyone have a second round?

1034 Tom?

1035 Senator Udall. I would like to just ask one question, Chairman Schumer.

1036 Chairman Schumer. Go ahead.

1037 Senator Udall. You know, one of the arguments that is made--and all three of

1038 you might weigh in on this because I think you have experience in this area. One of the

1039 arguments that is made is that if we change the Senate rules, somehow the Senate will

1040 become identical to the House. And there is this great fear, you know, that the Senate

1041 will be identical to the House. And that is expressed in a number of different ways.

1042 And so I guess my question to you today is: If either Senator Lautenberg's or

1043 Senator Bennet's proposals, which you both seem very up on at this point, were

1044 adopted, do you believe it would make the House and the Senate identical institutions?

1045 Ms. Sinclair. No.

1046 Senator Udall. And could you explain why?

1047 Ms. Sinclair. Well, both work actually to encourage real debate, and neither

1048 makes it easy, the way it is in the House, to simply put very stringent time limits on

1049 debate or to make decisions by a simple majority right off the bat. I mean, that

1050 would--I had always thought that if you wanted to do something, some kind of variation

1051 of--I think it is the Harkin proposal, with--

1052 Senator Udall. The declining threshold you are talking about, from 60 to 57.

1053 Ms. Sinclair. Yes, but I think that the important thing also would be to

1054 guarantee the minority some real debate time so that, you know--I mean, there you

1055 would not want the Senate to be able or the Majority Leader to be able to simply say,

1056 well, we will move to something else, and then, you know, we have the vote and then

1057 we did move to something else, and we have the second vote, et cetera. I mean, the

1058 minority--because what you want is if this is so important an issue that we are going to

1059 insist that a supermajority is required from both the opponents' and the proponents'

1060 point of view, I think it is important that you actually have debate and that there is a

1061 real chance for the minority to make its point.

1062 Chairman Schumer. Any other comments?

1063 Senator Udall. Yes, any other thoughts?

1064 Ms. Rybicki. Senator, even the Congressional Research Service can say that

1065 these reforms will not make the Senate and House identical.

1066 Senator Udall. I thought you would be willing to comment--

1067 [Laughter.]

1068 Ms. Rybicki. The fundamental premise of House procedures that the same

1069 majority that could pass a bill can set the terms for its debate. Neither Senate

1070 Resolution 440 or 465 establishes the way for a simple majority of Senators to end

1071 debate.

1072 Chairman Schumer. Well put.

1073 Senator Udall. Good. Mr. Koger?

1074 Mr. Koger. That is exactly what I was going to say. I would just add that--I

1075 mean, I think the intent of both of these proposals is to make the Senate more like the

1076 Senate and actually require debate about the topic that is being filibustered.

1077 Senator Udall. Okay. Thank you very much.

1078 Mr. Koger. Without changing the cloture threshold.

1079 Chairman Schumer. That was a good and appropriate ending. On behalf of

1080 the Rules Committee, I would like to extend special thanks to both Senators Lautenberg

1081 and Bennet. We appreciate that they took time to appear before us to explain their

1082 proposals.

1083 To our panel of academics and scholars, thank you for your presentations on

1084 these legislative proposals.

1085 The record will remain open for 5 business days for additional statements and

1086 questions from the Rules Committee members. Since there is no further business

1087 before the Committee, the Committee is adjourned subject to the call of the Chair.

1088 Thank you, one and all.

1089 [Whereupon, at 12:05 p.m., the Committee was adjourned.]